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January 29, 2007

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing

Date of Filing: August 25, 2006

Case Number: TSO-0424

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."[1] In this Decision I will consider whether, on the basis of the testimony and other evidence in the record of this proceeding, the individual's access authorization should be granted. As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the individual's access authorization should not be granted at this time.

I. Background

The individual is an applicant for a DOE security clearance. During a background investigation, a Local Security Office (LSO) learned that the individual had been arrested four times for alcohol-related offenses. This information prompted the LSO to conduct a Personnel Security Interview (PSI) with the individual in January 2006 to discuss the circumstances surrounding the individual's four arrests and his use of alcohol. Soon thereafter, the LSO referred the individual to a board-certified psychiatrist (DOE consultant-psychiatrist) for an examination. The DOE consultant-psychiatrist examined the individual in April 2006 and memorialized his findings in a report (Psychiatric Report or Exhibit 5). In the Psychiatric Report, the DOE consultant-psychiatrist concluded that the individual currently is (as of April 2006), and had been in the past, a user of alcohol habitually to excess. It was the opinion of the DOE consultant-psychiatrist at the time of the 2006 examination that the individual was neither rehabilitated nor reformed from the alcohol issues in this case. Ex. 5 at 21-22.

[1] Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

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In June 2006, the LSO sent the individual a letter (Notification Letter) advising him that it possessed reliable information that created a substantial doubt regarding his eligibility to hold a security clearance. The LSO also advised the individual that the derogatory information fell within the purview of one potentially disqualifying criterion set forth in the security regulations at 10 C.F.R. § 710.8, subsection (j) (hereinafter referred to as Criterion J).[2]

Upon his receipt of the Notification Letter, the individual, through his attorney, exercised his right under the Part 710 regulations and requested an administrative review hearing. On August 29, 2006, the Director of the Office of Hearings and Appeals (OHA) appointed me as Hearing Officer in the case. I convened a hearing in the case within the regulatory time frame prescribed in 10 C.F.R. § 710.25(g). At the hearing, seven witnesses testified. The LSO called one witness and the individual presented his own testimony and that of five witnesses. In addition to the testimonial evidence, the LSO submitted nine exhibits into the record; the individual tendered nine exhibits as well. I permitted the individual's Counsel to submit two post-hearing affidavits into the record of this case.

II. Regulatory Standard

A. Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that granting him an access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h).

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[2] Criterion J relates to information that a person has "[b]een, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse." 10 C.F.R. § 710.8 (j).

B. Basis for the Hearing Officer's Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.*

III. The Notification Letter and the Security Concern at Issue

As previously noted, the LSO cites Criterion J as the basis for suspending the individual's security clearance. To support Criterion J, the LSO relies on: (1) a board-certified psychiatrist's opinion that the individual currently is (as of April 2006), and had been in the past, a user of alcohol habitually to excess; and (2) the individual's four alcohol-related arrests, one in 1987 for Driving While Intoxicated (DWI), a second in 1990 for DWI, a third in 1994 for DWI and a fourth in 1997 for Reckless Driving after his refusal to take field sobriety and breath alcohol tests.

I find that the information set forth above constitutes derogatory information that raises questions about the individual's alcohol use under Criterion J. The excessive consumption of alcohol is a security concern because that behavior can lead to the exercise of questionable judgment and the failure to control impulses, which in turn can raise questions about a person's reliability and trustworthiness. *See* Guideline G of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued on December 29, 2005 by the Assistant to the President for National Security Affairs, The White House.

IV. Findings of Fact

The individual does not dispute that he habitually used alcohol to excess between the mid-1980s and 1994. Transcript of Hearing (Tr.) at 144. According to the record, the individual began consuming alcohol in high school and drank to the point of intoxication six times per year during his high school years (1984-1988). Ex. 5 at 29-32, 43. In 1987, the individual was arrested on his first DWI charge after his breath alcohol content registered .14 and .15 respectively on breath tests administered by the police. *Id.* at 41. By the individual's own account, his drinking increased during his college years. Ex. 3 at 6, Tr. at 138. [3] In 1990, the individual was arrested for his second DWI. Ex. 3 at 6. Four years later in 1994, the individual was arrested a third time and charged with DWI. *Id.* at 9. As the result of the third DWI, the court ordered the individual in 1994 to attend four Alcoholics Anonymous (AA) meetings. Ex. 5 at 92.

[3] The individual took a break from his college studies in 1989 when he enlisted in the military reserves for a 12-month period. He claims that while he was in the military reserves he consumed only minimal amounts of alcohol . Ex. 5 at 52-53.

The individual denies that he habitually used alcohol to excess at any point during the period 1994 to 2006. Much of the relevant information regarding the individual's drinking habits between 1994 and 2006 is gleaned from the Psychiatric Report. Specifically, the individual told the DOE consultant-psychiatrist in 2006 that he was intoxicated 12 times per year between 1994 and 1998, 12 times between 2001 and 2002, 18 times between 2002 and 2003, 12 times in 2004, and 10 times in 2005. Ex. 3 at 17-18. According to the individual, there were some periods between 1998 and 2006 when he abstained from alcohol completely. For example, he did not consume any alcohol for a six-month period between January and June 2003. Ex. 5 at 84. He also abstained from alcohol between January 1, 2006 and April 15, 2006. Tr. at 150. At the hearing, the individual explained that he had intended to abstain from alcohol completely beginning on New Year's Day in 2006 but that a friend's wedding occurred in April 2006, an event that resulted in his breaking his resolve to maintain abstinence. Tr. at 150. Over the course of his friend's four-day wedding celebration in April 2006 the individual claimed that he consumed one drink on one day, two drinks the next night, eight drinks the following evening and six to eight drinks the last evening of the function. Ex. 5 at 10, f.n. 21.

In addition to the individual's own statements about his drinking habits during the relevant period, the record reflects that the police arrested the individual in 1997 and charged him with Reckless Driving. According to the record, a State Trooper found the individual asleep in his vehicle on an interstate highway at 7:00 a.m. one morning. When the State Trooper requested that the individual take field sobriety and breath tests, the individual refused to do so, an action that triggered his arrest. The individual contended that he only had one beer the evening before his drive and that he decided to pull off the road to sleep when he became fatigued. Tr.at 162. At the hearing the individual claimed that he had refused the field sobriety test for several reasons including that (1) he was disheveled from his trip, (2) he had only slept two to three hours, (3) he is not "a morning person," and (4) he had a past history of DWIs. *Id.* 162-165. I found the individual's explanations at the hearing to be unconvincing and, for this reason, determined that he had not provided persuasive evidence that the 1997 arrest in question was not an alcohol-related arrest.

V. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c).[4] After due deliberation, I have determined that the individual's access authorization should not be

[4] Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding the conduct, to include knowledgeable participation, the frequency and recency of the conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation and other pertinent behavioral changes, the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

granted. I cannot find that granting the individual's security clearance will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

A. Habitual Use of Alcohol to Excess

While the individual does not dispute that he used alcohol habitually to excess from the mid-1980s until 1994, he does dispute the DOE consultant-psychiatrist's finding that he used alcohol habitually to excess during discrete periods of time between 1994 and 2006.

At the hearing, the individual claimed that he had inadvertently provided inaccurate information to the DOE consultant-psychiatrist during the psychiatric examination about the number of times that he had been intoxicated between 1994 and 2006. Tr. at 157. Using a blood alcohol content calculator to approximate his intoxication levels at various times between 1994 and 2006 (Ex. F), the individual tried to prove at the hearing that he was intoxicated only a few times between the dates in question. *Id.* at 158, 173. After carefully considering the individual's arguments and reviewing his documentary evidence on this matter, I was not persuaded that the individual did not drink alcohol habitually to excess during the specific periods at issue in this case. In making this finding, I considered that the DOE consultant-psychiatrist carefully probed behind the individual's statement during the psychiatric interview that intoxication means, "above .08." Ex. 3 at 16. The DOE consultant-psychiatrist asked the individual how he would know if he were intoxicated if he did not have a Breathalyzer to measure his BAC. *Id.* at 17. The individual stated, "I'd be very happy, extraverted, slurred speech, problems with balance and impaired judgment." *Id.* The individual's clarification on this issue during the psychiatric examination undermines his arguments now that he only interpreted intoxication to mean "legally intoxicated." In the end, I find that the individual's own admissions about the number of times that he had "slurred speech, balance problems and impaired judgment" after drinking during specific periods between 1994 and 2006 supports a finding that the individual habitually used alcohol to excess from 1994 through 1998, 2000 through 2002, 2004 through 2005 and a portion of 2006.

I turn now to address whether the individual has mitigated the security concerns associated with his habitual use of alcohol to excess.

B. Rehabilitation or Reformation

1. The Individual's Testimony and His Documentary Evidence

The individual testified that he has abstained from using alcohol since April 18, 2006. Tr. at 150. *See also*, Ex. G. He related that he is committed to abstinence even though he does not "subscribe to the opinion that" he requires abstinence. Tr. at 155. He testified that he has completed an intensive outpatient treatment program, is currently in aftercare and involved with the SMART recovery program, a self-help program based on the concept of self-management. Tr. at 162. He tendered two exhibits into the record that describes the SMART recovery program. *See* Exhibits B, D. When queried whether he

will revert to drinking at the next wedding that he attends, he responded negatively. Tr. at 207. He added that in October 2006 he attended an out-of-state function with some high school friends where alcohol was available for consumption and he did not drink. *Id.* Two of the individual's high school friends who attended the function in question furnished post-hearing affidavits attesting that they personally observed the individual refuse alcoholic beverages when offered to him at the function. *See* Exhibits H and I.

2. Friend #1

Friend #1 testified that she has known the individual for 20 years. Tr. at 9. She stated that she has never observed the individual drink to the point where it concerned her. *Id.* at 14. She related that when she went out drinking with the individual and friends, the individual would consume three to four alcoholic beverages. *Id.* at 16. She was present at the wedding in April 2006 when the individual was intoxicated. *Id.* at 20. According to her, the individual did not breach any of her confidences during that time even though he was in an inebriated state. *Id.* at 18. She testified that the individual has not consumed alcohol since April 2006 and that he is "in some sort of therapy." *Id.* at 21. She concluded her testimony by stating that the individual never told her that he had a problem with alcohol and she does not believe that he has a problem in this regard either. *Id.* at 23.

3. Friend #2

Friend #2 has known the individual since his high school days. *Id.* at 51. For a four-month period, the individual lived with him and his wife. *Id.* at 55. He opined that the individual is honest, reliable and trustworthy, noting that the individual has a key to his house and takes care of his dogs when he is away. *Id.* at 68. He testified that he attended the same wedding in April 2006 that the individual did, noting that the individual had more drinks than usual on that occasion. *Id.* at 66-67. When questioned if the individual's behavior changed after drinking, Friend #2 responded affirmatively and related that "he was gregarious." *Id.* at 67. Finally, he testified that the individual has changed because the individual has not consumed alcohol since April 2006. *Id.* at 82. According to Friend #2, the individual drinks Diet Coke on Friday nights while his other friends drink alcohol. *Id.* at 71.

4. Former Supervisor

The individual's supervisor during the period January 2005 through approximately July 2006 testified that the individual was a very honest, reliable employee. *Id.* at 30-34. She stated that she was shocked when she learned that the individual had several alcohol-related arrests because he had always acted professionally in the workplace. *Id.* at 35.

5. Current Supervisor

The individual's current supervisor has known the individual for two years but only became his supervisor in June 2006. *Id.* at 40. The supervisor opined that the individual is a great employee. *Id.* at 47. He stated that he has never observed any behavior on the

individual's part that would have caused him to believe that the individual had any issues with alcohol. *Id.* at 43.

6. Alcohol and Drug Abuse Treatment Center Program Director

The Program Director of the intensive outpatient alcohol and drug treatment center that the individual attends has 20 years experience in the "recovery business." Tr. at 87. The Program Director testified that the treatment center has been in existence for four years. *Id.* He explained that there are four kinds of programs at the treatment center: (1) a minimal program which focuses on early intervention, prevention and education; (2) an outpatient program that provides education and some therapy; (3) the intensive outpatient program that provides education, individual therapy and group therapy; and (4) aftercare.

The Program Director testified that the individual came to him because "he was concerned about being told that he had an alcohol problem and wanted more information." *Id.* at 95. He first met with the individual on June 28, 2006 and explained the individual's options to him. *Id.* at 97. According to the Program Director, there are two kinds of intensive programs that he offers, one for those who have been struggling with alcohol and drugs for many years and another for those with security clearances who have been questioned because of alcohol and drugs. *Id.* at 99. The individual is in the second program. *Id.* The Program Director testified that the program in which the individual is enrolled not only provides therapy but exposes the individual to self-help programs like the on-line SMART Program. According to the Program Director, the individual has attended 43 sessions at the treatment center. *Id.* at 96, 102. The Program Director opined that the individual's prognosis for remaining abstinent is excellent. *Id.* at 110. He added, "if that's what he decides to do, if he's going to remain totally abstinent from alcohol, I think he can do that." *Id.* He then noted that the individual had been abstinent for six months. *Id.* When queried how long he expects the individual to remain in aftercare, the Program Director responded first that he has no requirements for aftercare. *Id.* at 113. He then added, "I like people to stay connected for about one year."[5] *Id.* at 115.

7. The DOE Consultant-Psychiatrist's Opinion

The DOE consultant-psychiatrist listened to the testimony of all the witnesses before he testified. He first reaffirmed his findings in the Psychiatric Report with regard to his opinion about the individual's alcohol use and then reiterated the recommendations of what he considered as adequate evidence of rehabilitation or reformation for the individual. With regard to rehabilitation, he recommended the following:

[5] The Program Director testified that he referred the individual to a psychiatrist for another opinion. He then related "more or less" what the psychiatrist told him about the individual. I will accord no weight to the Program Director's statements about what the psychiatrist told him. For me to accord any probative weight to another expert's opinion in this case, that expert should have testified or at least have provided a psychiatric report for review and consideration.

(1) Documented evidence of attendance at AA with a sponsor and working on the 12 steps at least once a week for a minimum of 200 hours over at least a year's time and abstinence from alcohol and all non-prescribed controlled substances for a minimum of two years, or

(2) Satisfactory completion of a professionally run alcohol treatment program, either inpatient or outpatient, including aftercare, for a minimum of six months and abstinence from alcohol and all non-prescribed controlled substances for a minimum of three years.

As adequate evidence of reformation, the DOE consultant-psychiatrist reviewed the two options that he posited in his Psychiatric Report:

(1) Two to three years of abstinence from alcohol and all non-prescribed controlled substances if the individual goes through one of the two rehabilitation programs set forth above, or

(2) Five years of abstinence from alcohol and all non-prescribed controlled substances if the individual does not go through one of the two rehabilitation programs set forth above.

Tr. at 210, Ex. 5 at 22.

The DOE consultant-psychiatrist testified that he was not impressed by the individual's six months of sobriety because the individual had maintained abstinence before for periods of six months and then returned to drinking. Tr. at 210. With regard to the SMART program that the individual is using as an adjunct to his therapy, the DOE consultant-psychiatrist testified that he knows nothing about the program. *Id.* at 213. The DOE consultant-psychiatrist was adamant that the individual needs two to three years of abstinence after he completes his minimum six months in the alcohol treatment program. He explained that the individual suffered from "very bad alcohol abuse" for the ten-year period, 1987-1997, a factor that he considered in evaluating the possibility of relapse in this case. *Id.* at 212.

C. Hearing Officer Evaluation of Evidence

Based on the record before me, I find that the individual's six months of sobriety and his four months of treatment as of the date of the hearing are not sufficient for me to find that he is rehabilitated or reformed from his habitual, excessive use of alcohol during the times specified in the Notification Letter. In addition, there are a number of other factors that support my finding on this matter. First, the individual does not acknowledge that he has any recent problem with alcohol, a fact that might be an impediment to the individual's rehabilitation or reformation efforts. Second, I am concerned that the individual entered into treatment for its forensic value only. The DOE Counsel broached this subject on his cross-examination of the Program Director when he asked: "How comfortable are you that [the individual] is seeing you for help versus getting evidence?" Tr. at 120. The Program Director responded, "I think it's 50-50." *Id.* Third, it is unclear to me whether the individual has a network of support to assist him in maintaining his sobriety. Friend #1 does not believe that the individual has a problem with alcohol and Friend #2 testified that he and others consume alcohol while the individual drinks Diet Coke. Fourth, in evaluating the opinions of the Program Director and the DOE consultant-psychiatrist, I accorded more weight to the DOE consultant-psychiatrist's opinion because of his educational qualifications, his more than three decades of experience treating persons with substance addictions and his compelling testimony at the

hearing. In the end, it is simply too early for me to find that the individual is adequately rehabilitated or reformed in this case. Based on all the foregoing, I must find that the individual has not brought forth sufficient evidence to mitigate the security concerns predicated on Criterion J in this case.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criterion J. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I have found that the individual has not brought forth sufficient evidence to mitigate the security concern at issue. I therefore cannot find that granting the individual's access authorization will not endanger the common defense and is clearly consistent with the national interest. Accordingly, I have determined that the individual should not be granted an access authorization. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Ann S. Augustyn
Hearing Officer
Office of Hearings and Appeals

Date: January 29, 2007